in bringing such an action, after a proper request, a taxpayer might bring suit for the benefit of the municipality--if there is a right in the municipal corporation to prosecute such an action. But the recovery of funds in such an instance is for the benefit of the municipality. An action in the case above outlined would be a taxpayer's suit for the benefit of the municipality. There is no jurisdiction under the federal constitution or the federal statutes to entertain appellant's suit herein, even if it were to be considered a taxpayer's suit for the benefit of the municipality." (Emphasis added)
Otto v. Somers, 332 F.2d 697, 701, C.A. 6 (June, 1964)

Petitioner shows no more interest than being a "resident taxpaying individual member of a class of resident taxpayers of the City of Dayton * * * "

"It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members

of the public."

Ex Parte Le Vitte, 302 U.S. 633.

See Also, Perkins v. Lukens Steel Co., 310 U.S. 113, 125, Massachusetts v. Mellon, 262 U.S. 447, Doremus v. Board of Education, 342 U.S. 429.

No facts are alleged which in any manner connect the Federal Government with anything allegedly done so as to make the Fifth Amendment a ground of jurisdiction in this suit.

What was said by the United States Court of Appeals for the Sixth Circuit in Otto v. Somers, 332 F.2d 697, 699, et seq., is relevant here.

> "Title 42 U.S.C.A. § 1988, is not relevant to the issues raised in the present case.
>
> Section 1 of the Fourteenth Amendment has no application to this case. There is no law, statute or ordinance, here involved, which abridges the privileges or immunities of citizens of the United States, nor have any of the ordinances of the City of Dayton, upon which appellant relies, deprived any person of life, liberty, or property without due process of law, nor have they denied to

any person within its jurisdiction, the equal protection of the laws. Certainly, appellant has not been denied the equal protection of the laws as he is in the same situation as all other citizens and taxpayers of the municipality involved. 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' Williamson v. Lee Optical Co., 348 U.S. 484, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563. 'The equal protection clause of the Fourteenth Amendment is not violated unless there is shown the element of intentional or purposeful discrimination.' Hughes v. Heinze, 268 F.2d 864, 870 (C.C.A. 9).

Title 42 U.S.C.A. § 1983, is relied upon, in this case, to grant redress, for that which is condemned and forbidden by Section 1 of the Fourteenth Amendment to the Constitution of the United States, Downie v. Powers, 193 F.2d 760 (C.C.A. 10); and appellant * * * has not suffered any abridgment of his privileges as a citizen of the United States; nor has he been deprived of any right of property without due process of law; nor has he been denied the equal protection of the laws. The foregoing determination makes it unnecessary to discuss Article III, Section 2,

> of the Constitution, relied upon by appellant, as that Section is not relevant to any of the issues in the present controversy."

Plaintiff asserts jurisdiction under 28 U.S.C. § 1331 which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000., exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

To bring a case within the provisions of 28 U.S.C., Section 1331, a right or immunity created by the Constitution or Laws of the United States must be an essential element of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they are given another. The controversy must appear on the face of the complaint, and be genuine and present, not merely possible or conjectural. Gully v. First National Bank, 299 U.S. 109, 112. Shelby County Tennessee v. Fairway Homes, Inc., 285 F. 2d 617, 618, C. A. 6.

No facts are alleged to in any manner connect the Federal Government with the allegations in the complaint so as to involve

the Fifth Amendment to the United States Constitution.

It is respectfully submitted to the Court that petitioner has shown that no important question of Federal law is involved; no conflict exists, nor any unsettled law. It is further submitted to the Court that the courts below correctly decided that they had no jurisdiction over petitioner's claim. Therefore, it is submitted that the Writ should be denied.

Respectfully submitted,

James W. Drake,
City Attorney

W. Erwin Kilpatrick,
Asst. City Attorney

Edwin L. Roe,
Asst. City Attorney

CERTIFICATE OF SERVICE

I, Edwin L. Roe, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief, was served on Walter Otto, petitioner herein, by depositing a copy, addressed to him, first class postage prepaid, in the United States Post Office, this ____ day of September, 1966.

Edwin L. Roe
Asst. City Attorney

A P P E N D I X

By Dr. Snyder No. 21527

AN ORDINANCE

Authorizing an Amendment of the Existing Contract with Squire, Sanders and Dempsey, Dated as of July 29, 1964, for Services as Project Counsel in Connection with the Financing and Carrying Out of the Perry-Mead Urban Renewal Project, No. Ohio R-15.

WHEREAS, this Commission has heretofore authorized the City Manager to enter into a contract with Squire, Sanders & Dempsey, of Cleveland, Ohio, for services as Project Counsel in connection with the financing and carrying out of the Perry-Mead Urban Renewal Project, No. Ohio R-15; and

WHEREAS, such contract dated as of the 29th day of July, 1964 has been executed by the City Manager pursuant to such authority and by such Project Counsel; and

WHEREAS, the time expended and out-of-pocket expenses incurred by Squire, Sanders & Dempsey in its capacity as Project Counsel has exceeded the estimated amounts provided for in said contract; and

WHEREAS, this Commission desires to provide for such attorneys' reasonable compensation and actual out-of-pocket expenses by

increasing the maximum estimated amount of compensation stated in said contract by $5500. and out-of-pocket expenses by $500.; and

WHEREAS, it is immediately necessary that such revised contract for employment be effective so that the Urban Renewal Program vitally necessary to eliminate the conditions of blight and slum in the City of Dayton may proceed, and for the immediate preservation of the public peace, property, health and safety, this ordinance shall take effect at an early date; now, therefore

BE IT ORDAINED BY THE CITY OF DAYTON, OHIO:

Section 1. That the City Manager is hereby authorized to enter into a new agreement with Squire, Sanders & Dempsey, in all respects identical to the said existing agreement dated as of July 29, 1964, except that the estimated compensation of such Project Counsel shall be $13,500. and the estimated out-of-pocket expenses shall be $1500., so that the amended agreement in its entirety shall read as follows:

CONTRACT

THIS AGREEMENT entered into as of this 29th day of July, 1964, by and between the City of Dayton, State of Ohio, hereinafter referred to as the "City" and Squire, Sanders & Dempsey, a partnership of the City of Cleveland, State of Ohio, hereinafter referred to as the "Project Counsel";

WITNESSETH THAT:

WHEREAS, in order to finance the planning and carrying out of the Perry-Mead Project, No. Ohio R-15, the City has made or is making applications to the Housing and Home Finance Agency of the United States of America for Federal financial aid to the City under Title I of the Housing Act of 1949, as amended; and

WHEREAS, the City has undertaken certain activities necessary for the planning and carrying out of such Project, situated in the Project Area described in such applications; and

WHEREAS, the City has engaged the Project Counsel to render certain technical advice and assistance in connection with such undertaking of the City.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

1. Scope of Service. The Project Counsel shall assist the City Attorney, Director of Finance, Director of Department of Urban Renewal, and other officials of the City in connection with the aforesaid Project, as defined in such applications, including:

(a) The preparation or supervision of the preparation of legislation and other documents required by the City or the Housing and Home Finance Agency which involve legal advice and services,

(b) Review and analysis of all contracts and documents submitted to Project Counsel to determine compliance with the laws of the State of Ohio and laws and regulations of the United States,

(c) Negotiation with representatives of the Housing and Home Finance Agency for financial assistance under Title I of the Housing Act of 1949, as amended, in conformity with the laws of the State of Ohio, particularly those concerning the creation of debt by Ohio municipalities,

(d) Consultation whether in person or by telephone, with officials and other representatives of the City, its planning consultants, if any, and representatives of the Housing and Home Finance Agency at Dayton, Ohio, Cleveland, Ohio, Chicago, Illinois, and Washington, D. C., when necessary, and

(e) Legal research as may be required in connection with the foregoing.

Excluding all services which may be rendered in connection with other phases of the City's Urban Renewal Program or in connection with any litigation or in connection with the issuance of project preliminary loan notes.

2. Time of Performance. The services of the Project Counsel covered by this contract

commenced on July 2, 1963 and will be completed April 1, 1965.

3. Compensation. Project Counsel shall be paid reasonable compensation for such services estimated not to exceed $13,500. and in addition thereto out-of-pocket expenses incurred, including traveling expenses and telegraph and telephone charges estimated not to exceed $1,500.

4. Method of Payment. Project Counsel will from time to time render its statements for services rendered under paragraph 1 hereof to the date of each statement, each of which shall be paid by the City in the normal course of business.

IN WITNESS WHEREOF, the City and Project Counsel have executed this Agreement as of the date first above written.

Approved:

_____
Director of Law

CITY OF DAYTON

By_____
City Manager

SQUIRE, SANDERS & DEMPSEY

By_____
Partner

I hereby certify that the amount of money required to meet the expenditures called for by the above agreement, in the sum of $15,000. has been lawfully appropriated for such purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrance.

_____
Director of Finance

Section 2. This ordinance is hereby declared to be an emergency measure and provided it receives the affirmative vote of not less than four members of the Commission, it shall be in force and take effect immediately upon its passage, otherwise it shall be in force and take effect at the earliest period allowed by law.

Passed by the Commission February 3, 1965

Signed by the Mayor..... February 3, 1965

/s/ Frank R. Somers
MAYOR OF THE CITY OF DAYTON,
OHIO

Attest:

/s/ Oscar F. Mauch
Clerk of Commission

By Mr. Somers No. 21547

AN ORDINANCE

Authorizing the Payment of a Judgment, Rendered Against Certain Members of the Division of Police, as a Moral Obligation of the City.

WHEREAS, Under date of January 25, 1965, a judgment entry was filed, rendering judgment against Ralph J. Beutle, Raymond C. Weaver, Albert J. Zennie, Richard C. Grundish, and Paul J. Price in the sum of Two Thousand Five Hundred Five Dollars ($2,505.00); and

WHEREAS, Said judgment was the result of the arrest and detention of Thomas Massengale in the City Jail for a period of four days, during which time the officers were conducting an investigation of other burglaries which they had reason to believe Thomas Massengale might have been involved in or had knowledge of; and

WHEREAS, The officers were, during the entire four-day period, acting within the course of their regular duties as officers in the Division of Police; and

WHEREAS, There was incurred in the trial of the case, court costs amounting to Three Hundred Five and 93/100 Dollars ($305.93); and

WHEREAS, Such judgment and costs should, in order to avoid interest, be paid at as early a date as possible, and hence it is necessary for the immediate preservation of

the public peace, health, welfare, and safety that this ordinance take effect at an early date; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. That the aforesaid judgment, in the amount of Two Thousand Five Hundred and Five Dollars ($2,505.00) against Ralph J. Beutle, Raymond C. Weaver, Albert J. Zennie, Richard C. Grundish, and Paul J. Price, is, in the opinion of the Commission of the City of Dayton, a moral obligation of said City and should be paid by the City of Dayton.

Section 2. That the Chief of the Division of Police be, and he hereby is, authorized and directed to prepare and submit a voucher drawn on Code No. 8007 payable to Thomas Massengale and Carroll E. Hunt, his attorney, in the amount stated in Section 1 hereof, and a voucher in the amount of Three Hundred Five and 93/100 Dollars ($305.93) payable to Jesse Yoder, Clerk of Montgomery County, Common Pleas Court, for the court costs incurred in Case No. 117403 of the docket of said Court.

Section 3. For the reasons stated in the preamble hereof, this ordinance is declared to be an emergency measure and shall take effect immediately upon its passage.

Passed by the Commission February 17, 1965
Signed by the Mayor February 17, 1965

/s/ Frank R. Somers
MAYOR OF THE CITY OF DAYTON, OHIO

Attest:
/s/ Oscar F. Mauch
Clerk of the Commission

By Dr. Snyder No. 21568

AN ORDINANCE

To Authorize the Execution of an Agreement With The Board of County Commissioners of Montgomery County for the Replacement and Enlargement of the Baltimore and Ohio Overpass Structure on Wagoner Ford Road.

WHEREAS, As the result of the construction of the Kitty Hawk Golf facilities, the Dayton Water Works Plant, and the new Delco-Moraine improvement, the volume of vehicular traffic on Wagoner Ford Road has greatly increased, necessitating an enlargement of the Baltimore and Ohio Overpass which structure, upon examination, is found to be old, weakened from rust, and in need of extensive repairs; and

WHEREAS, Preliminary plans have been prepared by the County Engineer to replace the existing structure with a four-lane structure, including necessary approaches, estimated to cost Four Hundred Fifty Thousand Dollars ($450,000.00) exclusive of consulting engineering fees and costs of rights-of-way, which plans have been reviewed and approved by the City's Director of Water and Director of Service and Buildings; and

WHEREAS, It is proposed that the City of Dayton dedicate, for street use, the land which it owns within the corporate limits of the City and which is needed for the North approach to

said structure, and that the City also contribute One Hundred Thousand Dollars ($100,000.00) as its share of the total cost of said improvement; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. That this Commission authorizes and the Director of Service and Buildings is directed to execute, on behalf of the City of Dayton, an agreement with The Board of County Commissioners of Montgomery County, Ohio, substantially in the form as now on file in the office of the Clerk of this Commission.

Section 2. That the sum of One Hundred Thousand Dollars ($100,000.00) to be paid by the City to Montgomery County as its share of this improvement, shall be paid from the Permanent Improvement Fund "D," Account No. 9002.

Passed by the Commission March 10, 1965
Signed by the Mayor, March 10, 1965

/s/ Frank R. Somers
MAYOR OF THE CITY OF DAYTON, OHIO

Attest:

/s/ Oscar F. Mauch
Clerk of the Commission

Sec. 733.57, et seq., Ohio Revised Code.

"§ 733.57. SPECIFIC PERFORMANCE.

When an obligation or contract made on behalf of a city, granting a right or easement or creating a public duty, is being evaded or violated, the city solicitor shall apply for the forfeiture or the specific performance thereof as the nature of the case requires."

"§ 733.58. MANDAMUS.

In case an officer or board of a city fails to perform any duty expressly enjoined by law or ordinance, the city solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty."

"§ 733.59. SUIT BY TAXPAYER.

If the city solicitor fails, upon the written request of any taxpayer of such city, to make any application provided for in sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the city. Any taxpayer of any municipal corporation in which there is no solicitor may bring such suit on behalf of such municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding."

Sec. 59, et seq., City of Dayton Charter

"Section 59. The City Attorney shall apply, in the name of the city, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the city, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the city in contravention of law, or which was procured by fraud or corruption.

Section 60. When an obligation or contract made on behalf of the city granting a right or easement, or creating a public duty, is being evaded or violated, the City Attorney shall likewise apply for the forfeiture of the specific performance thereof as the nature of the case requires.

Section 61. In case any officer or Board fails to perform any duty required by law, the City Attorney shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

Section 62. In case the City Attorney, upon written request of any taxpayer of the city, fails to make any application provided for in the preceding three sections, such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the city. No such suit or proceeding shall be entertained by any court until such request to the City Attorney shall first have been made, nor until the taxpayer shall have given security for the costs of the proceeding.

Section 63. No such action to enjoin the performance of a contract entered into, or the payment of any bonds or notes issued by the city, shall be brought or maintained unless commenced within one year from the date of such contract, bonds or notes.

Section 64. If the court hearing any such action be satisfied that the taxpayer had good cause to believe his allegations were well founded, or that they are sufficient in law, it shall make such order as the equity and justice of the case demand. In such case the taxpayer shall be allowed his costs, and if judgment be finally entered in his favor, he may be allowed as part of the costs a reasonable compensation for his attorney."